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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1965

## No. 719

CONVOY COMPANY,
*Appellant,*

vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,
*Appellees.*

**On Appeal from the United States District Court for the District of Oregon**

## JURISDICTIONAL STATEMENT

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No.

CONVOY COMPANY,
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vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,
*Appellees.*

**On Appeal from the United States District Court for the District of Oregon**

## JURISDICTIONAL STATEMENT

Appellant appeals from the final order and judgment of the United States District Court for the District of Oregon, entered on July 20, 1965, dismissing the complaint of appellant as plaintiff in the Court below which sought to set aside, annul and declare void certain orders of the Interstate Commerce Commission. Appellant respectfully submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

## OPINION BELOW AND ORDERS OF COMMISSION

The order and judgment of the District Court of Oregon (unreported) is set forth in Appendix "A" attached hereto. There was no opinion of the Interstate Commerce Commission precedent to its orders which are set forth in Appendix "B" attached hereto.

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## JURISDICTION

Appellant, as plaintiff, brought this action under Title 28 of the United States Code, Sections 1336, 1398, 2284 and 2321 through 2325; Title 49, United States Code, Sections 17 (9), 305 (g), 305 (h), 306 (a) and 307 (a); and Section 10 of the Administrative Procedure Act, Title 5, United States Code, Section 1009, to enjoin, annul and set aside orders of the Interstate Commerce Commission providing for the issuance of a certificate of public convenience and necessity by that Commission. The issuance of said certificate was stayed by the Honorable Justice Douglas on the petition of appellant. The judgment and order of the District Court was entered on July 20, 1965. Notice of appeal was filed in the District Court on September 10, 1965. The jurisdiction of the Supreme Court to review this decision by direct appeal was conferred by 28 U.S.C. § 1253 and § 2101 (b). This Court has jurisdiction: *Interstate Commerce Commission v. Parker,* 326 U.S. 60 (1945). *American Trucking Assns., Inc. v. United States,* 364 U.S. 1 (1960).

## QUESTIONS PRESENTED

(1) Whether the District Court erred in holding that there was substantial evidence to support a determination of public convenience and necessity by the Interstate Commerce Commission as required by Section 207 (a) of the Interstate Commerce Act (49 U.S.C. 307 (a)) for the extension of the motor common carrier operating rights of Commercial Carriers, Inc. (hereafter referred to as Commercial Carriers):

(a) Where the Commission refused to hold a hearing although one was requested for the purpose of offering evidence bearing on the ultimate question of public convenience and necessity;

(b) Where no shipper showed any present or future need for the extended authority, and there was sufficient and satisfactory certificated motor carrier service in the area covered by the extension;

(c) Where the extension is based on a policy decision of the Commission which was tentative only, and which the Commission itself has in effect stayed by opening a new proceeding not yet concluded for the purpose of redetermining the issues of said policy decision, which had already been eroded by a subsequent decision of the Commission making contrary findings on certain issues;

(d) Where exhibits containing substantial evidence showing that there was no basis for enlarging the certificate, even under the policy decision, were offered to the District Court and marked for identification but were not received or considered.

(2) Whether the Fifth Amendment and Sections 5 (a) and (b), 7 (c) and 8 (b) of the Administrative Procedure Act (5 U.S.C. 1004 (a) and (b), 1006 (c) and 1007 (b)) have been violated by orders of the Interstate Commerce Commission which contain no reference to material issues of fact and law, are based upon no hearing, though one was repeatedly requested by appellant, and set forth no findings or conclusions supporting them, thus resulting in failure to accord due process of law.

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## STATEMENT OF THE CASE

Appellant, Convoy Company, is an Oregon corporation, being a motor common carrier holding a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing the transportation of automobiles, among other vehicles, in truckaway service, in secondary movements, between points in Oregon in interstate or foreign commerce, as pertinent to this case. Appellant has held this certificate for some twenty years and has continuously provided service to the public under it.

Commercial Carriers, a motor carrier of automobiles and trucks, on September 30, 1959, obtained an order from the Commission approving the purchase by it of Western Auto Transport, Inc., which then held a certificate from the Commission, among others, authorizing the transportation of new automobiles by the truckaway method in initial movements from Detroit, Michigan, to all points in Washington and

Oregon over irregular routes. On December 3, 1963, Commercial Carriers filed a petition with the Commission for "modification" of its certificate which was, in effect, a request for an expansion of its authority and the issuance of a new certificate so as to permit it to transport new automobiles, by the truckaway method, in secondary movements, from Portland, Oregon, to points in Oregon and Washington over irregular routes, restricted to automobiles that have been manufactured or assembled at plants of the Chrysler Corporation in Detroit, Michigan, and further restricted to said automobiles that have had an immediately prior movement by rail.

This petition was filed by Commercial Carriers, responsive to the suggested procedure of the Commission in its decision in *National Automobile Transporters Association—Declaratory Order,* 91 M. C. C. 395 *(NATA),* decided October 15, 1962. In that case the Commission reviewed the history of automobile transporting, emphasizing the diversion in 1960 and thereafter from truck to rail of hauls of automobiles previously handled by initial carriers from the assembly points. Initial carriers are those who originate shipments from the plants in a first motor carrier movement, all other movements being secondary. The Commission in its decision in the *NATA* case dealt specifically with the adverse effects on the motor carriers of such diversion and proposed a method for the initial carriers to obtain relief through modification of their certificates so as to authorize secondary movements from rail ramps to consignees of shipments

which come by rail from the assembly plant, previously served by the motor carrier in initial movements, to the ramp points on the rail system in destination areas. The Commission briefly indicated what it would expect in such a petition, primarily a showing of the volume of traffic handled by the motor carrier before and after diversion by rail.

Despite the vigorous protest of appellant and its request for oral hearing and offer to submit testimony, the Commission nevertheless on December 17, 1964, service date, December 23, 1964, issued its order, by its Division 1, granting the petition, authorizing the proposed service from Portland, Oregon, to points in Oregon only, restricted as previously set forth. This order was issued without an oral hearing, supported only by the bare petition. The lack of due process evidenced thereby is the fundamental basis for this appeal.

Appellant, Convoy Company, as a motor carrier, pursuant to the operating authority above set forth, participated in the distribution of Chrysler traffic for many years, including those of 1955 through 1957, and 1961 to the present time. Exhibits showing, among other things, the volume and revenues of appellant's participation and its investments to take care of the traffic were offered to the District Court, the Commission having refused to hold a hearing, but such evidence was not received or considered.[1]

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[1]A review of the exhibits offered and not received or considered by the Court shows the pertinency and materiality of the evidence to be adduced. Thus, Exhibit 1 shows the sub-

Appellant brought this action to set aside the action of the Interstate Commerce Commission after having exhausted its administrative remedies.

The hearing was before the District Court as a specially-constituted three-judge Court pursuant to 28 U.S.C § 2325 and § 2284, comprised of the Honorable Ben C. Duniway, Circuit Judge, John C. Bowen and Gus J. Solomon, District Judges.

The District Court's opinion, Appendix "A" hereof, summarily affirmed the orders of the Commission and dismissed the action of appellant on the grounds that the evidence offered was not offered to the Commission and, in any event, was not germane to any issue

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stantial investment of appellant at Portland, Oregon, in excess of $1,800,000 (terminal and equipment). Exhibit 2 shows that the annual revenues of Commercial Carriers (to whom the certificate was ordered to be released by the Commission) averaged $15,000,000 for the period 1961 through 1964. These compare to the insubstantial traffic disclosed in the petition of Commercial Carriers, Appendix "A" (no revenue figures were given), of only 1,190 vehicles delivered into Oregon by it from May, 1958, through December, 1959. Thus, the inconsequential revenues of the Oregon haul as compared to the gross did not warrant relief to Commercial Carriers, Inc., under the NATA decision and factually distinguishes the Motor Convoy case hereafter referred to. The said appendix also reveals that there were many months when no vehicles were delivered at all, including summer months when obviously other carriers were doing the business. On the other hand, Exhibit 8 offered by appellant shows that, even during the years as far back as 1955, appellant enjoyed revenues of as much as $392,000 a year of Chrysler traffic, 40% of which was destined to Oregon points. Exhibit 9 shows the revenue from Chrysler traffic delivered to Oregon by appellant from 1961 through 1964, being over $150,000 in 1964.

While not providing specific detail, appellant asked the Commission for a hearing to present such evidence, as well as to show the eroding effects on appellant of successive grants of such new rights to competitors.

in the case, and that the orders of the Commission complained of were supported by substantial evidence, were not arbitrary or capricious, and that the decision in *Motor Convoy, Inc. v. U.S.*, D.C. Ga., 235 F. Supp. 250 (1964), affirmed *per curiam*, 85 S. Ct. 1575 (1965), was persuasive.

The District Court in deciding adversely to appellant failed: (1) to determine the right of the Commission by the NATA decision to adopt a general policy granting certificates of public convenience and necessity without substantial evidence and without a hearing; (2) to consider the fact that the NATA decision was not and is not final, and in fact was rendered ineffective by the decision of the Commission in *Ex Parte No. 230*, 322 I. C. C. 301 (1964), wherein findings were made which the Commission itself held were inconsistent with and contrary to those made in NATA, as had been predicted by the dissenting Commissioners in NATA; (3) to consider the fact that after the decisions in NATA and *Ex Parte No. 230*, the Commission established a new proceeding for the purpose of considering the field of substituted service for automobile transporters, including all of the questions pertinent to NATA. That case is entitled *"Substituted Service—Charges and Practices of For-Hire Motor Carriers of Automobiles (Piggyback Service)"* and docketed as *Ex Parte No. 230*, Sub. No. 1; (4) to consider the fact that in view of the establishment of the proceeding in *Ex Parte No. 230*, Sub. No. 1, it is inappropriate for the Commission to issue certificates, particularly without hearings, on the basis of NATA,

which, as aforesaid, was superseded both by *Ex Parte No. 230* and *Ex Parte No. 230,* Sub. No. 1; (5) to consider the rights of appellant, Convoy Company, as they would be adversely affected by inflicting upon it new competition without any showing of public convenience or necessity therefor in contravention of Section 207 (a) of the Interstate Commerce Act (49 U.S.C § 307 (a)); (6) to consider the manner in which the shippers obtained delivery from Portland, Oregon, to points in Oregon since 1960-1961 when diversion to the rail lines occurred; (7) to consider the evidence offered by appellant, Convoy Company, including evidence of the volume and revenues derived by it for the years 1955 through 1957, and 1961 through 1964 of such Chrysler traffic, indicating complete adequacy of existing service to meet the shipper's needs, and evidence that the volume of traffic was an unimportant proportion of Commercial Carriers' business and therefore inadequate to qualify under the NATA decision; or (8) to consider whether the Commission's order and procedure accorded due process of law under the Fifth Amendment and under the Administrative Procedure Act (5 U.S.C 1007) particularly in view of the fact that no hearing was held despite the statutory requirements therefor and the written request of appellant coupled with its protest timely filed against the granting of the petition.

On this appeal appellant contends that as a matter of law Commercial Carriers' prior authority to transport automobiles from Detroit, Michigan, for Chrysler Corporation forms no lawful basis in and of itself on

which the Commission could grant new authority to Commercial to transport automobiles from Portland, Oregon, to points in Oregon, following independent movements by railroads; that proof of public convenience and necessity under Section 207 (a) of the Interstate Commerce Act (49 U.S.C 307 (a)) and the requirements of the Administrative Procedure Act necessitate a hearing and a record upon which a finding of need for additional service can be made only if supported by substantial evidence; that the action of the Commission in granting a certificate under the circumstances presented without a hearing is arbitrary, unlawful, and a denial of the rules of fair play which are basic to our legal system.

Appellant further contends that the Court was in error in failing to consider and find material the evidence offered, and in holding that the evidence had not been properly offered to the Commission when in fact in appellant's request for a hearing, it was made known to the Commission that appellant would have evidence to present showing the volume of traffic which it had handled and the adverse effects of the diversion threatened by the grant of authority to Commercial Carriers. Furthermore, the Commission failed to adopt its invariable practice, when it determined that no hearing be held, of using the so-called modified procedure which permits the submission of evidence in affidavit form, and no notice was presented to appellant that the Commission would in the case before it fail and refuse to abide by the procedures specified in its own rules and invariably invoked

by it, that is, either a hearing or modified procedure.[2] Therefore, appellant was under no notice that any evidence which it had to offer had to be outlined in detail, believing that either a hearing would be held for the purpose of presenting specific evidence in the areas in which it did clearly indicate it had evidence to offer, or that it would be permitted through verified statements to submit evidence in a no-hearing procedure. As a matter of fact, in certificate cases, except under the NATA policy, it is the Commission's practice to hold a hearing whenever there is a protest even though the applicant requests that the Commission invoke modified procedure unless there are so many parties (not the case here) that prehearing conferences are held at which specific procedures are adopted including provision for verified statements and hearings to cross-examine affiants.

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**QUESTIONS ARE SUBSTANTIAL**

This appeal presents questions of very substantial importance in the administration of Section 207 (a) of the Interstate Commerce Act (49 U.S.C § 307 (a)) upon which the Supreme Court has not had the occasion to make any definitive determination and which are so substantial as to require plenary consideration by this Court. The paramount question of greatest importance relates to whether the Interstate

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[2]General Rules of Practice of Interstate Commerce Commission, 1.45 through 1.54, 27 F.R. 7519, effective July 16, 1962.

Commerce Commission may lawfully devise and apply as the *sole criteria* of public convenience and necessity the loss of business by a motor carrier resulting from a change in the method of distribution by a shipper; and whether, in one full sweep, the Commission may abandon the connotations of the nouns in the phrase "public convenience and necessity" and grant substantial and important operating rights without hearings, or any other procedure which makes it possible to develop a record, all on the basis of a policy adopted in one case which is rendered ineffective by another and reopened in a third not yet concluded.

Appellant recognizes that the Supreme Court has affirmed the decisions of the Commission and the District Court in *Motor Convoy, Inc. v. U.S.*, supra. Since that decision, however, it has become apparent that the questions involved are more substantial than apparently was believed to be the case by the Court. Almost every grant of authority that has been issued by the Commission in the NATA policy decision has been appealed to a federal court. The tendency of such courts is, of course, to be governed by the affirmation of the Supreme Court in the *Motor Convoy* decision, but the District Court in that decision did not mean its opinion to be a precedent. It said:

> "We are not ruling that the Commission was compelled to grant Dixie's application, but only that it was authorized in so doing, nor do we wish to set an unfortunate precedent for future applications wherein it might clearly appear that there is relevant testimony that should be considered by the Commission." (P. 253)

The Court further stated that it failed to find in the record any statement as to the nature of the testimony the protesting carriers desired to introduce before the Commission, nor did it find any résumé of the same in the brief filed in the case. (P. 261) Furthermore, the petition in Motor Convoy showed that approximately 70% of petitioner's gross revenue was involved in the diversion, whereas the Commercial Carriers' petition shows that the revenues were relatively insignificant compared to its gross revenues and those of its predecessor. In fact, the Commission denied a similar petition, also without a hearing, involving a plant of Chrysler in California wherein the petitioner also sought to serve points in Oregon from railheads in Oregon and wherein a larger volume of traffic had been shown to have been transported by that petitioner from California to Oregon than by the petitioner Commercial Carriers from Detroit to Oregon. All this appellant offered to prove to the District Court by Exhibit No. 12, the order of the Commission in the Robertson Transports Petition.

The *Motor Convoy* case is no precedent upon which this Court, we respectfully submit, should now affirm a motion to dismiss. In fact, the results of that case emphasize the error of granting important rights without having a properly developed record upon which to base the decision.

It is clear from the decision and order in Appendix "A" that the District Court in issuing its decision in this case was strongly influenced by the *Motor Convoy* affirmation. In fact, at the oral argument, the Court

dwelled extensively upon the point that the decision was virtually binding upon it. Then, in the case of *United Transports, Inc. and Auto Convoy Co. v. The United States of America and the Interstate Commerce Commission* (United States District Court for the Western District of Oklahoma, No. 65-118, Civil, ..... F. Supp. .....), the District Court on September 9, 1965, by a 2-to-1 vote sustained the Commission's grant of operating rights under the NATA policy. However, a strong dissent by Judge Luther Bohanon, District Judge, clearly denotes the need for review by this Court so that this matter may be finally determined. He found that a hearing was necessary under the involved statutes and the Fifth Amendment. Counsel for plaintiffs in the *United Transports* case has informed counsel for appellant that an appeal will be taken to the United States Supreme Court on substantially the same grounds as are here advanced.

Furthermore, by virtue of the success of the Commission in the *Motor Convoy* case other carriers are being encouraged to file similar petitions even though the purported diversion occurred some four or five years ago, and even though the remedy of NATA was prescribed by the Commission in 1962. So it appears that existing carriers such as appellant will be faced with an increasing number of new competitors who will be permitted to invade the areas of existing carriers' operations without any evidence of any need therefor whatsoever, all on an ex parte basis contrary to law. *(First National Bank of Smithfield v. First National Bank of ENC,* 232 F. Supp. 725 (1964).)

Thus, this Court should, we respectfully urge, in the interests of justice review the procedures adopted by the Commission contrary to those required by law and contrary to those observed by the Commission over the past fifty years. The orders issued by the Commission contain no opinion or explication of the bases upon which the orders are founded. There are no adequate findings and conclusions as required by the Administrative Procedure Act (5 U.S.C 1001, et seq.). If this were an isolated case, we could well understand the reluctance of the Court to grant full review, but it is not isolated. It is one of many, and there will be many more unless the Court aids justice by reviewing and determining the issues.

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**THE NATIONAL TRANSPORTATION POLICY IS THWARTED BY THE DECISION IN NATA AS IMPLEMENTED BY THE COMMISSION IN THE ORDERS COMPLAINED OF.**

The basic policy in the disposition of cases such as this has been that by reason of the diversion to railroads the initial motor carriers should be permitted to "follow the traffic" to the railhead destination points for distribution from there by the motor carriers to surrounding areas.

The difficulty is that the Commission itself has emphatically rejected that theory in *Smith & Solomon Trucking Co., Extension,* 61 M. C. C. 748 (1953), where, upon a record made at a hearing, it pointed out the fallacy of the "follow the traffic" doctrine and said on pages 752-753:

". . . the grant of authority on a mere showing of loss of traffic without proof of lack of adequate existing service in the new location would be contrary to law and to sound reasoning."

". . . we are restricted by the Act to the issuance of authority only where the proposed service is required by the public convenience and necessity."

"There is one other aspect of this type of case which requires consideration. The declared transportation policy requires us to foster sound economic conditions in transportation. We are required, therefore, to consider among other things the effect of the injection of a new carrier, without proof of public need, on the existing competitive situation in the considered territory."

"If motor common carriers in a given area are affording satisfactory service for the public, they should not be made to suffer by the entry of a new carrier, which in the first instance, is seeking to follow a particular shipper."

The District Court for New Jersey in *Smith & Solomon Trucking Co. v. United States,* 120 F. Supp. 277 (1954), in sustaining the Commission said:

"The chief concern of the Commission, and rightly so, was to determine whether public convenience and necessity required the granting of this application. *Interstate Commerce Commission v. Parker,* 326 U.S. 60, 65, 65 S. Ct. 1490, 89 L. Ed. 2051; *United States v. Detroit Navigation Co.,* 326 U.S. 236, 241, 66 S. Ct. 75, 90 L. Ed. 38. This is the primary test under the statute and unless the application qualified under the test the Commission had no authority to allow it." (Page 279)

> Further: "The national transportation policy which the Commission had very much in mind and which is of vital importance in any decision on the instant type of transportation problem does make it mandatory on the Commission, as the latter states, 'to foster sound economic conditions in transportation.' By reason of that policy itself the Commission must carefully weigh the entire relevant situation." (Page 279)

There is even less reason to give credence to the "follow the traffic" theory in this case, and others like it, particularly where there is no hearing, because within the distribution area there are already motor carriers, such as Convoy, with complete facilities, including terminals on or adjacent to rail property, equipment, and personnel to effect distribution. These facilities have been acquired at tremendous expense, and appellant needs all of the traffic coming in by rail in order to effect efficient and economical distribution in full load lots, all as pointed out to the Commission in its protest and request for hearing and as developed by the exhibits offered to the District Court. Furthermore, the carriers with initial authority often interlined with appellant at a Montana point for delivery by appellant in Oregon, rather than incur the expense of transporting all the way through themselves. In any event, the adoption by the Commission of its rejected "follow the traffic" theory in these cases, without calling it that directly, is in violation of the national transportation policy, and should be reviewed by this Court. It is time, we urge, for this

Court to determine what weight, if any, the "follow the traffic" principle, as reborn in NATA, can be given under the national transportation policy and under Section 207 of the Interstate Commerce Act upon the determination of the issue of public convenience and necessity. The question is important not only to appellant, but to all of the many existing secondary motor carriers who are threatened with impairment under that principle by virtue of the NATA decision which in itself, as shown, is in limbo.

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SUFFICIENCY OF THE COMMISSION'S ORDERS.

As noted, the Commission has not satisfied the minimum requirements of the Administrative Procedure Act, Section 8 (b), 5 U.S.C 1007 (b), which requires that decisions shall "include a statement of (1) findings and conclusions, as well as the reason or basis therefor on all the material issues of fact, law or discretion presented on the record; . . ." The Act, Section 1009, subsection 3 also gives the Court responsibility to determine all relevant questions of law and to set aside decisions which are unsupported by substantial evidence. The Act, including the review provisions, are applicable to the decisions of the Commission. *Riss & Co. v. United States,* 341 U.S. 907 (1951); *American Trucking Assns., Inc. v. United States* (supra), 364 U.S. 1 (1960); *Atlantic & St. Andrews Bay Railway Co. v. United States,* 104 F. Supp. 193 (1952); *Pacific Inland Tariff Bureau v.*

*United States,* 129 F. Supp. 472 (1955). The lack of findings apparent in this case fails to give the decision any validity under said Administrative Procedure Act. *Florida v. U. S.,* 282 U.S. 194 (1934), wherein the Court said:

> "The question is not merely one of the absence of elaboration or of a suitable complete statement of the grounds of the Commission's determination, to the importance of which this court has recently adverted (*Beaumont, S.L. & W.R. Co. v. United States,* decided November 24, 1930, 282 U.S. 74, 91 S. Ct. 1), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

A recent decision upholding these principles is *Northeast Airlines v. C.A.B.,* 331 F. 2d 579 (1964).

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**THIS APPEAL IS IMPORTANT.**

As demonstrated herein, there are substantial legal questions raised on this appeal. The District Court did not come to grips with them, but in a cursory fashion dismissed the complaint because the Supreme Court had on motion affirmed the District Court in

the *Motor Convoy* case. The vital interest of numerous carriers in the principle here involved has now been revealed. The distinction between the *Motor Convoy* case and this case has been shown. The need for a determination by the Commission, pursuant to law, and on a case by case basis, has been established.

Unless the judgment of the Court below is reversed, appellant, Convoy Company, which has invested substantial sums and has been for years meeting the needs of the Chrysler Corporation in Oregon, will be threatened with the loss of needed traffic for which it holds the requisite authority and has the necessary facilities. That threat will be multiplied by successive ex parte grants by the Commission unless the Court calls a halt. Furthermore, many other carriers will be faced with similar impairment, all without any proof of need for new services. The indiscriminate handout by the Commission of certificates, without any evidence of the need therefor, will encourage a deluge of new petitions even though the NATA policy decision was issued in 1962. It must be evident that the carriers who felt they were warranted in applying for relief under the NATA policy would have promptly done so, yet petitions such as this one were filed long after that decision, and more will follow unless this Court makes a determination, as we respectfully submit it should, whether the Commission, contrary to its own well-established policies can short-circuit and circumvent the requirements of law by granting additional substantial rights of vital importance without any showing of public convenience and necessity

whatever, without hearing, and even without adopting modified procedure.

Wherefore, appellant prays that this Court note probable jurisdiction, hear this direct appeal on its merits, and reverse the judgment of the Court below.

Dated, November 1, 1965.

Respectfully submitted,

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**(Appendices "A" and "B" Follow)**

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## Appendix "A"

In The United States District Court
For The District of Oregon

Civil No. 65-241

Convoy Company,
Plaintiff,
vs.
The United States of America and The Interstate Commerce Commission,
Defendants.

### ORDER AND JUDGMENT

This Court has considered the evidence tendered by plaintiff, and, without determining its admissibility, finds that such evidence was not proffered to the Commission and is not germane to any issue in this case; and it appearing that the orders of the Commission dated December 17, 1964, and April 7, 1965, issued in its Docket No. MC-43038 (Sub-No. 415), *Commercial Carriers, Inc., Petition for Modification of Existing Certificate,* are supported by substantial evidence and are not arbitrary or capricious, and that the decision in *Motor Convoy, Inc. v. United States,* D.C. Ga. 1964, 235 F.Supp. 250, *aff'd per curiam,* 33 U.S.L. Week

3385 (U.S. June 1, 1965), ..... U.S. ....., is persuasive.

Now, Therefore, the orders of the Commission are hereby affirmed and this action dismissed.

Dated this 20th day of July, 1965.

Ben C. Duniway
United States Circuit Judge

John C. Bowen
United States District Judge

Gus J. Solomon
United States District Judge

## Appendix "B"

Service Date
December 23, 1964

ORDER

At a Session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D. C., on the 17th day of December, A. D. 1964.

No. MC-43038 (Sub-No. 415)

Commercial Carriers, Inc.
(Romulus, Mich.)

*It appearing,* That Certificate No. MC-43038 (Sub-No. 415), dated December 15, 1959, was issued to petitioner authorizing operation as a common carrier by motor vehicle, in interstate or foreign commerce, as pertinent here, of new automobiles, in initial movements, in truckaway service, from Detroit, Mich., to points in Oregon;

*It further appearing,* That in its report and order in *National Auto Transporters Assn.—Declaratory Order, NATA,* 91 M.C.C. 395, (decided October 15, 1963), the Commission *inter alia,* (a) determined that motor carrier holders of "initial" and "secondary" authority to transport automobiles should be placed in a position to be able to continue to participate in the transportation of certain traffic they enjoyed prior to the advent of trailer-on-flatcar and multi-level rail car service, and (b) outlined a procedure for modifying the certificates and permits of such motor carriers;

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of Commercial Carriers, Inc., filed December 3, 1963, for modification of certificate;

(2) Petition of National Trucking Company, filed January 10, 1964, for stay of the proceeding, or, in the alternative, consolidation with Ex Parte No. 230 (Sub-No. 1), *Substituted Service—Charges and Practices of For-Hire Motor Carriers of Automobiles;*

(3) Reply of Commercial Carriers, Inc., petitioner in (1) above, filed January 27, 1964, to petition in (2) above;

(4) Reply by Convoy Company to petition in (1) above, filed January 27, 1964, embracing a request for oral hearing;

(5) Reply by Commercial Carriers, Inc., petitioner in (1) above, filed February 28, 1964, to request for oral hearing in (4) above;

and good cause appearing therefor:

*We find,* That the present and future public convenience and necessity require that Certificate No. MC-43038 (Sub-No. 415), dated August 1, 1958, be modified as set forth in the succeeding paragraph;

*It is ordered,* That upon full compliance by Commercial Carriers, Inc., with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act and the rules and regulations of the Commission

thereunder, Certificate No. MC-43038 (Sub-No. 415), dated December 15, 1957, be modified by adding thereto the following:

> New automobiles, in secondary movements, in truckaway service from Portland, Oreg., to points in Oregon, restricted to automobiles manufactured or assembled at plants of the Chrysler Corporation at Detroit, Mich., and having an immediately prior movement by rail.

*It is further ordered,* That the requests for oral hearing in (2), (4), and (5) above be, and they are hereby, overruled, for the reason that disposition of the issues involved can be resolved on the basis of information of record and that no good cause appears at this time for assigning the matter for oral hearing;

*It is further ordered,* That, except to the extent modification is granted in the second preceding paragraph, the relief sought be, and it is hereby, denied;

*And it is further ordered,* That if applicant does not comply with the requirements set forth in the second ordering paragraph, within 60 days from the date of service of this order, or within such additional time as may be authorized by the Commission, the petition of applicant considered and disposed of by this order shall stand denied in its entirety, effective upon the expiration of the said compliance time.

By the Commission, Division 1.

(Seal) Harold D. McCoy,
Secretary.

Service Date
April 16, 1965.

ORDER

At a Session of the Interstate Commerce Commission Division 1, Acting as an Appellate Division, held at its office in Washington, D.C., on the 7th day of April, A.D. 1965.

No. MC-43038 (Sub-No. 415)
Commercial Carriers, Inc.
(Romulus, Mich.)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of Convoy Company, protestant, filed January 21, 1965, for reconsideration of the order of December 17, 1964, modifying Certificate No. MC-43038 (Sub-No. 415), embracing a request for a stay of the proceeding pending determination of Ex Parte No. 230 (Sub-No. 1), *Substituted Service-Charges and Practices of For-Hire Motor Carriers of Automobiles;*

(2) Reply by Commercial Carriers, Inc., filed March 12, 1965;

and good cause appearing therefor:

*It is ordered,* That the motion be, and it is hereby, overruled for the reason that the order of the Commission, Commissioners Herring and Tucker, in Ex Parte No. 230 (Sub-No. 1), *Substituted Service-Charges and Practices of For-Hire Motor Carriers of Automobiles,* setting that proceeding for oral hearing

does not conflict with the modification of authority herein made pursuant to criteria set forth in *National Auto Transporters Assn.-Declaratory Order,* 91 M.C.C. 395;

*It is further ordered,* That the said petition be, and it is hereby, denied for the reasons (a) that the order of December 17, 1964, by Division 1, was entered in accordance with the law after it appeared applicant's certificate in No. MC-43038 (Sub-No. 415) should be modified and petitioner's petition for oral hearing denied, (b) that at the time applicant's petition for modification (which gave rise to this proceeding, filed December 3, 1963) was published in the Federal Register, ample opportunity was afforded interested persons to submit written statements and arguments, factual and legal, supporting their respective positions, (c) that statements and arguments were filed and considered in the disposition of the said petition of December 3, 1963, (d) that protestant has not shown what evidence, if any, will be offered if an oral hearing were held, (e) that the statements and arguments of position by protestants of record do not require or support a different conclusion than that reached in the said order of December 17, 1964, and (f) that no sufficient or proper cause appears for vacating or reconsidering the order of December 17, 1964. Compare *The Motor Convoy, Inc., et al. v. U.S.* 235 F. Supp. 250;

*It is further ordered,* That, unless compliance is made by applicant with the requirements of Sections 215, 217 and 221(c) of the Interstate Commerce Act,

within 90 days after the date of service of this order, or within such additional time as may be authorized by the Commission, the grant of authority made in the order entered herein on December 17, 1964, shall be considered as null and void, and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission, Division 1, Acting as an Appellate Division.

(Seal)

Bertha F. Armes,
Acting Secretary.

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# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 719

CONVOY COMPANY, APPELLANT

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON*

## MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

### STATEMENT

Certificates authorizing interstate motor transportation of automobiles are generally limited either to "initial authority," which authorizes movements of new automobiles from manufacturing or assembly plants, or to "secondary authority," authorizing all other movements. Such classifications, however, reflect an older pattern of transportation of automobiles—trans-



795-152—65

portation entirely by motor carriers. In recent years, this pattern has changed radically as the result of the advent of coordinated rail-motor service.[1] New automobiles now move from the manufacturing or assembly plant largely by rail for the line-haul movement, with the motor carrier portion of the transportation limited to the short hauls to or from the railheads.

Responding to the changed situation, the Commission in *National Automobile Transporters Association, Petition for Declaratory Order,* 91 M.C.C. 395 (*NATA*), issued a comprehensive ruling clarifying the status of motor carriers in regard to coordinated rail-motor movements. The Commission first ruled that where the traffic leaves the point of origin by rail, a motor carrier holding initial authority is not authorized to perform the remaining motor portion of the movement, *i.e.,* from the destination railhead to the consignee. Second, noting that the new pattern of rail-motor transportation of automobiles has caused a sharp decrease in the tonnage and revenues of motor carriers with initial-authority certificates, the Commission ruled that such a motor carrier might use an expedited procedure to secure a modification of its "initial authority" certificate permitting it to handle the motor portion of its own former traffic. But such modification—which could be secured upon a showing of the volume and routing of movements before and after the introduction of coordinated rail-motor service (91

[1] Trailer-on-flatcar service ("TOFC") and multi-level rail car service ("MLRC").

M.C.C. at 415)—would be permitted "only to the extent necessary to enable a petitioner to continue to participate in the remaining motor movement [of its own former traffic], and not to encroach on the rights of other existing carriers" (*id.* at 416). The Commission expressed the hope "that such petitions can be disposed of with a minimum of expense and effort for all concerned, and perhaps without oral hearing" (*ibid.*).

The Commission's orders here in issue (J.S. App. B.) granted the petition of Commercial Carriers, Inc., for a limited modification of its motor common carrier certificate pursuant to the *NATA* ruling. Under its certificate, Commercial was authorized to transport new automobiles from the Chrysler plant in Detroit to certain points in Oregon. The sole effect of the modification was to permit Commercial to substitute multi-level rail car service (see n. 1, *supra*) for the beginning portion of its formerly all-motor movement. The three-judge district court unanimously sustained the Commission's orders, holding that they "are supported by substantial evidence and are not arbitrary or capricious," and that the decision in *Motor Convoy, Inc.* v. *United States,* 235 F. Supp. 250, affirmed *per curiam,* 381 U.S. 436, in which similar orders were sustained, "is persuasive" (J.S. App. A., pp. i–ii).

## ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The Commission's orders were issued pursuant to criteria

and procedures upheld only last Term by the Court. *Motor Convoy, Inc.* v. *United States, supra.* The principal legal and factual issues raised by appellant were there presented and decided.

1. Appellant argues (J.S. 11–12, 15–18) that the limited modification granted Commercial Carriers to enable it to participate in coordinated rail-motor movements between the points named in its certificate should be treated the same as the grant of a *new* certificate of public convenience and necessity, and that the Commission, therefore, was required to conduct a hearing for the purpose of determining whether the new service was required by the shipping public and whether the services of the protesting carriers, such as appellant, were inadequate. However, as expressly held in *Motor Convoy,* the kind of limited modification granted by the Commission here, restricted as it is to the precise traffic Commercial Carriers transported prior to the advent of coordinated rail-motor service,[2] does not enable the carrier to

[2] Verified statements filed by Commercial Carriers and not disputed by appellant showed the volume and routing of Chrysler traffic transported by Commercial Carriers from Detroit, Michigan, to points in Oregon both before and after the shift to coordinated rail-motor movement, in which the traffic moves by rail from the plants in Detroit to Portland, Oregon, and thence by motor to other points in Oregon. The modification granted by the Commission authorizes Commercial Carriers to transport automobiles in "secondary movements" from Portland to other points in Oregon but restricts it to the movement of "automobiles manufactured or assembled at plants of the Chrysler Corporation at Detroit, Mich., and having an immediately prior movement by rail"—thus strictly limiting Commercial to the remaining motor portion of its own former traffic (J.S. App. B., p. v).

institute a new service in competition with other carriers, and hence the standards for determining whether a new certificate should be issued are wholly inapplicable. "The need for the transportation by [applicant] had previously been established and [applicant] had already been supplying that need, and continued to supply that need just as before with the exception of the substitution of rail carriage in lieu of motor carriage for part of the way." *Motor Convoy, Inc.* v. *United States, supra,* 235 F. Supp. at 253. Carriers such as the present appellant "would not be affected by the situation" (*ibid*), since the modification merely permits Commercial to carry its own former traffic, not appellant's traffic, and creates no new service to compete for appellant's traffic.

2. Appellant next argues (J.S. 15–18) that the Commission's orders are inconsistent with the doctrine that new common carrier authority will not ordinarily be granted to permit a carrier to "follow the traffic" of a particular shipper. *Smith & Solomon Trucking Co., Extension,* 61 M.C.C. 748, sustained, 120 F. Supp. 277. The same contention was rejected in *Motor Convoy,* and is clearly without merit. The doctrine has to do with new certificates; its object is to prevent a disruption of "the existing competitive situation, since the new carrier's operation in such territory cannot be restricted." 61 M.C.C. at 753. As noted earlier, in the present case the limited modification granted by the Commission creates no new competition; hence, the *Solomon* doctrine is inapplicable.

3. Appellant finally[3] contends (J.S. 3, 8–9)[4] that the *NATA* decision has been impaired by subsequent proceedings wherein the Commission has been investigating the general subject of "piggyback" service in the movement of automobile and other traffic. But one of the two subsequent proceedings, *Ex Parte No. 230,* does not even involve the carriage of automobiles; the other, *Ex Parte No. 230, Sub. No. 1,* as specifically recognized by the Commission, does not "conflict with the modification of authority herein made pursuant to criteria set forth in *National Auto Transporters Assn.—Declaratory Order*" (J.S. App. B. p. vi–xii), since *Ex Parte No. 230, Sub. No. 1* is specifically limited to TOFC service and at issue here is MLRC service.

---

[3] Two other contentions of appellant may be dealt with summarily. The first (J.S. 18–19) is that the orders of the Commission granting Commercial's petition for modification are not supported by adequate findings. A similar contention was rejected by this Court in *Motor Convoy;* and the Commission's orders in the present case (J.S. App. B) specifically refer to the uncontroverted facts in Commercial Carrier's petition, to its prior decision in the NATA case and the criteria therein established, and to the *Motor Convoy* decision—thus making amply clear the basis upon which it was proceeding. The second contention (J.S. 3, 6, 9) is that the district court erred in refusing (J.S. App. A) to consider evidence outside the record made in the Commission proceeding. But consideration of such evidence clearly "would have been improper," since the court's review must be "limited to review of the evidence before the Commission." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 227.

[4] Petitions advancing similar contentions were rejected by the Commission in its order of January 20, 1960, in the *Motor Convoy* case, and such contentions were not pursued on judicial review.

## CONCLUSION

This appeal presents no substantial issue that has not already been decided by this Court last Term in the *Motor Convoy* case. Plenary consideration is not warranted, and the judgment below should be affirmed.

Respectfully submitted.

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DONALD F. TURNER,
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DECEMBER 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

**No. 719**

CONVOY COMPANY, INC.,

*Appellant,*

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,

*Appellees,*

COMMERCIAL CARRIERS, INC.

*Intervening Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

## MOTION TO AFFIRM, BRIEF IN SUPPORT, AND CERTIFICATE OF SERVICE FILED ON BEHALF OF INTERVENING APPELLEE, COMMERCIAL CARRIERS, INC.

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*Appellees,*

COMMERCIAL CARRIERS, INC.

*Intervening Appellee.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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## MOTION TO AFFIRM

---

Pursuant to Rule 16, Paragraph 1 (c) of the Revised Rules of this Court, Commercial Carriers, Inc. moves that the judgment of the United States District Court, District of Oregon, be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

---

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*Attorney for Intervening Appellee*
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Indianapolis, Indiana 46204

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IN THE

# Supreme Court of the United States

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CONVOY COMPANY, INC.,

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*Intervening Appellee.*

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## BRIEF IN SUPPORT OF MOTION TO AFFIRM

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

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CONVOY COMPANY, INC.,

*Appellant,*

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,

*Appellees,*

COMMERCIAL CARRIERS, INC.

*Intervening Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

## BRIEF IN SUPPORT OF MOTION TO AFFIRM

Intervening Appellee, Commercial Carriers, Inc., files this its Brief in Support of its Motion to Affirm the Judgment and Order of the three-judge Federal Court, review of which is sought in the proceeding above captioned, and in support thereof respectfully shows:

## I. DECISION FOR REVIEW

The final order and judgment of the United States District Court for the District of Oregon, entered on July 20, 1965, and here sought to be reviewed by Appellants is appended to Appellant's Jurisdictional Statement identified as Appendix "A" thereto.

## II. APPELLATE JURISDICTION

The jurisdiction of this Court to review such final order and judgment is acknowledged by this Intervening Appellee.

## III. INVOLVED STATUTES

The Federal statutes involved are:

1. The Interstate Commerce Act, 49 U.S.C.A. 301 (307).

2. The Administrative Procedure Act, 5 U.S.C.A. 1001 (1007 b).

## IV. QUESTIONS PRESENTED FOR REVIEW

1. Whether the questions on which the decision of the cause depends are so unsubstantial as not to need further argument considering the prior decision of this Court in *The Motor Convoy, Inc. v. United States*, 235 F. Supp. 250, affirmed *per curiam* 381 U. S. 436. This Intervening Appellee says: "Yes!"

2. Whether the three-judge Court committed reversible error in refusing to set aside order of the Interstate Commerce Commission in Docket MC 43038, Sub 415, dated December 23, 1964, and

April 16, 1965. This Intervening Appellee says: "No!"

## V. STATEMENT OF THE CASE

The final order and judgment of the United States District Court, District of Oregon, entered on July 20, 1965, and here sought to be reviewed by Appellant, dismissed a complaint brought to set aside orders of the Interstate Commerce Commission (J. S. App. B). The Commission's orders granted the petition of Intervening Appellee, Commercial Carriers, Inc. for modification of its present common carrier certificate, No. MC 43038, Sub 415, to the extent that, under the modified certificate, Commercial Carriers, Inc. was authorized to continue to transport Chrysler Corporation traffic it had previously handled in through truckaway service from Detroit, Michigan to points in Oregon, by means of truckaway service, ex-rail, from Portland, Oregon, to points in Oregon.

The District Court unanimously sustained the Commission's orders and found that "the orders of the Commission, dated December 17, 1964, and April 7, 1965, issued in its Docket No. MC 43038 (Sub No. 415), Commercial Carriers, Inc. Petition for Modification of Existing Certificate, are supported by substantial evidence and are not arbitrary or capricious," (J. S. App. A) and that the decision in *Motor Convoy, Inc. v. United States*, 235 F. Supp. 250, affirmed *per curiam* 381 U. S. 436, "is persuasive" (ibid).

## ARGUMENT

The questions presented for review in the instant proceeding have all been considered by this Court in *The Motor Convoy, Inc. v. United States, supra.* The facts in *Motor Convoy* are almost identical to the facts in the instant proceeding. In *Motor Convoy* this Court gave its approval to the procedure for modification of certificates set down by the Interstate Commerce Commission in *National Automobile Transporters Association—Declaratory Order*, 91 M.C.C. 395. Intervening Appellee, Commercial Carriers, Inc., complied with this procedural criteria to the letter, in the same manner as Dixie Transport Company complied in the *Motor Convoy* case. Appellant does not even attempt to distinguish the instant case on the facts from the situation in *Motor Convoy* other than to allege that the volume of traffic in the instant situation was not as great nor did it involve as great a percentage of petitioners' total volume as was involved with Dixie Transport. Appellant is actually requesting the Court to directly reverse its decision in *Motor Convoy*, without distinguishing it, and to determine collaterally that the procedure set forth in *National Automobile Transporters Association—Declaratory Order, supra*, are violative of the Administrative Procedure Act (5 U.S.C. 1001, 1004 (a)(b) and 1006 (c) and 1007 (b).

Part II of the *Interstate Commerce Act*, 49 Stat. 543, 49 U.S.C.A. 301-327, establishes the power of the Interstate Commerce Commission to issue Certificates of Public Convenience and Necessity authorizing motor carriers to engage in the transportation of passengers and property in interstate or foreign commerce. The provisions of the Act and, in particular, the provisions of Section

207(a), 49 U.S.C.A. 307(a), established certain statutory criteria to be met before a Certificate of Public Convenience and Necessity may be issued by the Commission and, where such criteria are met, "a Certificate shall be issued to any qualified applicant therefor".

The Act is silent, however, with respect to the procedure to be employed by the Commission in the receipt of evidence which would tend to prove or disprove that an applicant for a Certificate of Public Convenience and Necessity was a qualified applicant and met the criteria of Section 207(a), namely, the applicant's fitness, willingness, and ability to provide the proposed service in conformity with the provisions of the Act and the regulations of the Commission and the fact that the present or future public convenience and necessity required such certification in whole or in part. Discretion is left with the Commission to determine the necessary procedures in its administration of the provisions of the Act.

This Court has given recognition to the discretionary power of the Commission to establish procedural criteria in exercising its discretionary judgment to determine whether an applicant for operating authority has met the statutory requirements of Section 207(a). *United States v. Pierce Auto Freight Lines*, 327 U. S. 515, 535-36 (1946); *Interstate Commerce Commission v. Parker*, 326 U. S. 60, 65 (1945).

The *Administrative Procedure Act*, 5 U.S.C.A. 1001, imposes no further limitation upon the Commission than the requirement that notice of the filing of an application for a Certificate of Public Convenience and Necessity be given to the general public with an opportunity afforded to interested parties to present their views and evidence in support of their views. Neither statute requires the Com-

mission to hold a public hearing merely because one is requested by an interested party.

Neither the *Administrative Procedure Act* nor the *Interstate Commerce Act*, requires the Interstate Commerce Commission to hold an oral hearing where, in the judgment of the Commission, all of the evidentiary facts upon which the issues of law can be determined are capable of presentation in the pleadings. *United States v. Storer Broadcasting Co.*, 351 U. S. 192, 205 (1956). As will be noted hereinafter, there is no factual dispute in the Commercial Carriers, Inc. proceeding in Docket No. MC-43038, Sub No. 415 which decision is here sought to be reviewed. There is no evidence of record that the affording of an oral hearing as requested by Appellant would have produced any factual evidence beyond that fully considered by the Commission in its disposition of petition of Commercial Carriers, Inc., for modification of its certificate. The allegations of fact presented by protestant Convoy Company were admitted by petitioner Commercial Carriers, Inc., and the facts stated by affidavit of the president of Commercial Carriers were not controverted by protestant in any of its protests, replies or petitions, nor are the facts presented therein disputed in this appeal.

As a result of a petition filed with the Commission on June 27, 1960, by National Automobile Transporters Association, the Commission established certain procedures to be followed by motor carriers of new automobiles seeking modification of their then held operating authorities in order to enable them to coordinate their services with rail carriers in trailer-on-flatcar or multi-level car service. Upon receipt of the petition, the Commission gave it Docket No. MC-C-3024, gave public notice of the filing of the petition, received pleadings and briefs from interested

parties, including the Appellant in the instant litigation, held a hearing for the receipt of testimony and documentary evidence, issued a tentative report, accepted further responsive pleadings, and ultimately issued its Report and Order in MC-C-3024, entitled "*National Automobile Transporters Association—Declaratory Order*" on October 15, 1962, reported in 91 M.C.C. 395. Judicial review of the latter decision has never been sought by the Appellant in the instant litigation, nor by any other party.

In the *National Automobile Transporters Association—Declaratory Order* case, *supra*, the Commission found that motor carriers of automobile traffic holding "initial" authority could not transport such traffic from a rail terminus, without modification of such operating authority so as to permit "secondary" operating authority within the meaning of those terms as defined in *Administrative Ruling No. 75*, promulgated by the Commission's Bureau of Motor Carriers in 1938 and thereafter followed by the Commission in numerous decisions. The Commission further found that without such modification many carriers were faced with a loss of the traffic which they were then enjoying by reason of the intervention of rail TOFC and tri-level car service; that this would have disastrous economic effects; and that it was in the public interest to permit modification of such certificates in those instances where a carrier could show by petition to the Commission that it had been engaged in the movement of traffic; that it had lost the traffic because of rail intervention, and that the traffic was still available for movement by the applicant in the event of such modification.

Commercial Carriers' petition for modification of its certificate in Docket No. MC-43038, Sub No. 415 met the criteria or procedural methods suggested by the Commission in *National Automobile Transporters Association—De-*

*claratory Order* and a finding to this effect is contained in the Commission's order of April 7, 1965.

In this order of April 7, 1965, the Commission, Division 1, acting as an Appellate Division, recognized the decision of the three judge Federal Court in *The Motor Convoy, Inc. et al. v. U. S. et al.*, 235 F. Supp. 250, which was subsequently affirmed per curiam by this Court, 381 U. S. 436, which in turn recognized the controlling effect of the Commission's findings in the *National Automobile Transporters Association—Declaratory Order* case as justification for its action in Commercial's Petition for Modification.

Appellant argues that the limited modification authorized by the Commission is equivalent to the issuance of a new certificate and, therefore, requires a new proof of the need for the service; i.e. proof of public convenience and necessity. The District Court in *Motor Convoy, supra* at 253, met an identical argument head on and stated: "The need for the transportation by [applicant] had previously been established and [applicant] had already been supplying that need, and continued to supply that need just as before with the exception of the substitution of rail carriage in lieu of motor carriage for part of the way." The District Court further found that where the existing carriers such as Appellant herein are concerned, they "would not be affected by the situation" (ibid), since no new service in competition with such carriers is authorized by the modification.

Disregarding the relative merits of the positions of Commercial Carriers, Inc. and Convoy Company in the original petition, the Appellant here would seek reversal of the Commission's action on the technical contention that the Commission went beyond its statutory authority in granting relief to the Petitioner without making adequate findings. However, this Court has found that it is sufficient on judicial review if the findings of the Commission, considered in composite, express in clear and understanding manner the Commission's conclusion. *Alabama Great Southern Railway Co. v. United States,* 340 U. S. 216, 95 L. Ed. 225, 71 S. Ct. 264.

While it might appear that Appellants in the instant litigation are merely attacking the action of the Interstate Commerce Commission in the Commercial Carriers, Inc. Petition and the affirmance of that action by the three-judge District Court, in actuality the Appellants are attacking the procedural criteria established by the Commission in *National Automobile Transporters Association —Declaratory Order* as is evidenced by one of the concluding paragraphs in Appellant's jurisdictional statement appearing on Pages 19 and 20 thereof. Appellants there take the position that all motor carriers holding "secondary" operating authority to transport motor vehicle traffic are in jeopardy if this type of certificate modification by the Commission is allowed to stand. This attempt to secure judicial review of the Commission's decision in the *National Automobile Transporters Association—Declaratory Order* case should be rejected. The decision of the three-judge District Court should be affirmed.

## VII. CONCLUSION

For the reasons indicated, this intervening Appellee, Commercial Carriers, Inc., respectfully prays that its Motion to Affirm the judgment of the three-judge District Court be granted.

Respectfully submitted,

DONALD W. SMITH,
Suite 511, 111 Monument Circle,
Indianapolis, Indiana 46204,
*Attorney for Intervening Appellee*
Commercial Carriers, Inc.

SMITH AND SMITH,
*Of Counsel*

## CERTIFICATE OF SERVICE

I, Donald W. Smith, attorney for Commercial Carriers, Inc., Intervening Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 3rd day of December, 1965, I served copies of the foregoing Motion to Affirm and Brief in Support of Motion upon all parties of record in this proceeding by first class air mail, postage prepaid, as follows:

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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1965

## No. 719

CONVOY COMPANY,
*Appellant,*

vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,
*Appellees.*

**On Appeal from the United States District Court for the District of Oregon**

## BRIEF OF APPELLANT OPPOSING MOTIONS TO AFFIRM

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**On Appeal from the United States District Court for the District of Oregon**

## BRIEF OF APPELLANT OPPOSING MOTIONS TO AFFIRM

Appellant files this, its brief, opposing motions to affirm, pursuant to Rule 16(3) of the Revised Rules of this Court.

### STATEMENT

The statement of the case is set forth on pages 4 through 11 of appellant's Jurisdictional Statement,

and no material allegation therein contained is modified or refuted by the brief statements in the motions to affirm. Therefore, unnecessary repetition will be avoided.

Both the Government and the intervening appellee telescope the arguments of appellant into the framework of *Motor Convoy, Inc. v. U. S.*, 235 F.Supp. 250, affirmed per curiam, 85 S. Ct. 1575. They fail to meet the essential issues raised in appellant's Jurisdictional Statement. Like Linus, they wrap themselves into the comforting security of the Commission's decision in *National Automobile Transporters Association—Declaratory Order*, 91 M.C.C. 395 (NATA), while largely ignoring appellant's arguments attacking the Commission's policy adopted in NATA of issuing ex parte "modified" certificates of public convenience and necessity.

Nor do they consider matters not of record or discussed in *Motor Convoy*. These are: First, the eroding effect of subsequent orders of the Commission upon NATA, except that the Government contends (Motion, p. 6) that Ex Parte No. 230 does not involve the carriage of automobiles and that Ex Parte 230, Sub. No. 1, does not include multi-level rail-car service—conclusions hereafter shown to be untenable;[1] Second, the fact that the District Court in *Motor Convoy* specifically upheld the view that relevant testimony

[1]The Commission's decision in Ex Parte No. 230, 322 I.C.C. 301, was appealed on issues not relevant here, and the Court reversed the Commission as to said issues. *Atchison, Topeka and Santa Fe Ry. Co. v. U. S.*, 244 F.Supp. 955. Notice of appeal filed.

should be received and considered by the Commission —no such testimony was offered in *Motor Convoy*. Appellant described the nature of the evidence it would tender, but the Commission never gave it a chance to do so. This evidence was particularized and offered to the Court below as hereafter shown but it refused to rule on its admissibility and perfunctorily found it "not germane to any issue in this case." (J.S. Appendix A.)

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## ARGUMENT

### 1. THE MOTOR CONVOY CASE IS NOT CONTROLLING.

The ready willingness of the Government to have the Interstate Commerce Commission issue orders which are completely without evidentiary support and which violate all the principles of fair play, as exemplified in the Administrative Procedure Act the applicability of which was developed in the Jurisdictional Statement, now requires the attention of this Honorable Court.[2] The disaffection of many carriers with the orders of the said Commission under the so-called policy of NATA has been evidenced in a number of court proceedings and more will inevitably be initiated as a result of further pending cases before the Commission which will no doubt lead to the same ex parte procedure unless the Court, by granting a

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[2] *Riss & Co. v. United States*, 341 U.S. 907 (1951) holds that the Act applies to proceedings of the Commission. J.S., pp. 9, 15, 18.

hearing in this case, requires the Commission to accord due process to parties in the position of appellant.[3]

Appellant urges that a substantial question warranting the plenary consideration by this Court is presented in this case.

Appellant quoted (J.S., p. 12) from the District Court's opinion in *Motor Convoy,* including the statement:

> ". . . nor do we wish to set an unfortunate precedent for future applications wherein it might clearly appear that there is relevant testimony that should be considered by the Commission."

In the Jurisdictional Statement (pp. 12-14), appellant disclosed the considerable variance in the basic facts, so far as they were permitted to be elaborated, in this case as compared to *Motor Convoy.* In *Motor Convoy,* the Court stated that it failed to find in the record any statement as to the nature of the testimony

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[3]The procedure utilized by the Commission was to publish notice of the petition for "modified" certificate in the Federal Register which provided for participation by interested parties as follows:

> "Any person or persons desiring to participate in this proceeding may file *replies* to said petition (original and fourteen (14) copies each) within 45 days of the date of this publication in the Federal Register." (Emphasis supplied.) (F.R. Dec. 18, 1963, page 13825.)

With the filing of said replies, the Commission, refusing to grant an oral hearing and failing to establish any other method of developing a record, such as modified procedure, issued an order granting a modified certificate. Appellant's petition for reconsideration, including a renewed request for hearing was denied. All of the above-mentioned pleadings and order are a part of the record.

that the protesting carriers desired to introduce before the Commission nor did it find any resume of the same in the brief filed in the case (p. 261). In distinction to the situation there, here appellant at all stages before the Commission specifically requested an opportunity to be heard, described the nature of the evidence which it would present,[4] and, before the District

---

[4]At pages 9 and 10 of Reply, Protest and Request for Oral Hearing, timely filed with the Commission, appellant said:

> "On further hearing [there was no hearing so word "further" is inadvertent] protestant Convoy would be prepared to show that it has been transporting for Chrysler Corporation into Oregon and Washington a substantially greater volume of traffic originating by rail in Michigan and that at least three terminals are required for that purpose. It is apparent, we believe, that the traffic which Commercial enjoyed prior to the rail diversion during the eighteen months shown could not have meant much to petitioner's predecessor, Western Auto Transport. The revenues are not shown, but compared to the gross of Western they could not have been very significant. Western Auto Transport was one of the largest of the automobile transporters and petitioner certainly now is.
>
> It would be grossly unfair to now permit petitioner, as a successor of a no longer existing carrier over three years after the operation terminated, to invade the field occupied by protestant Convoy Company and threaten to divert, not the amount of business which Western enjoyed, but the substantially greater volume which Convoy has been able to develop.
>
> In this regard Convoy is prepared to show that the Chrysler traffic into Oregon and Washington originates in California as well as Michigan. Convoy by reason of its ability to integrate traffic from numerous assembly plants through its railhead terminals can maintain a relatively steady volume of traffic moving to dealers expeditiously and efficiently. To fragmentize the business by permitting each initial hauler to perform secondary service from numerous railheads for single manufacturers would be to so thin out the traffic as to make the whole distribution system unsound and unprofitable."

In its Petition for Rehearing and Reconsideration, on page 4, timely filed with the Commission, appellant renewed its request for an oral hearing so that it could offer testimony as set forth in its Reply. The said Petition is also a part of the record.

Court offered evidence, summarized in the Jurisdictional Statement, in footnote 1, pp. 6 and 7.[5]

The motions to affirm fail to consider, to discuss, or to refute the evidence offered by appellant and the arguments it has made with respect thereto,[6] but have preferred, for obvious reasons, to synthesize the whole controversy into the simple proposition that since the Commission's "modification" of Commercial Carriers certificate merely permitted it to continue for part of the journey what it formerly did for the entire route, no hearing or submission of evidence through the Commission's modified procedures was required. The matter is just not that uncomplicated. As appellant showed in the Jurisdictional Statement, footnote, page 7, and in the statement of the case, page 9, Commercial Carriers during many months of the past transported none or only an inconsequential part of the

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[5]The Government contends (Motion, footnote 2, p. 4) that the verified statements filed by Commercial Carriers were not disputed by appellant. However, in said footnote 1, appellant set forth the figures revealed in Appendix A of said verified statement and showed that it disclosed inconsequential traffic, and that during many months of the summer when traffic should have been heavy no vehicles were transported at all by Commercial Carriers; thus, appellant did challenge the conclusion of the Commission that Commercial Carriers qualified under the policy of NATA, assuming that policy was valid. Neither motion deals with this issue as to qualification which, reduced to an absurdity, if the Commission is to be upheld, would result in a carrier being authorized to engage in transportation within a particular territory if it had prior to the NATA decision transported one vehicle into that area.

[6]The Government merely says it would have been improper for the District Court to consider such evidence. (Government Motion, p. 6, footnote 3.) Intervening appellee contends that it has not been established that appellant would have produced any factual evidence beyond that considered by the Commission. Further, that the allegations of fact were admitted by Commercial Carriers. (Intervening Appellee's Motion, page 6.)

Chrysler traffic which is involved. Appellant, on the other hand, during past periods did transport and is now transporting the Chrysler traffic, and invested substantial sums in terminals and equipment for the handling of such traffic.[7]

Furthermore, the accumulative effects of grants of such authority based upon the policy enunciated in NATA and without any evidence of public convenience and necessity as required by Section 207 of the Interstate Commerce Act, now support appellant's contention that when opportunity to present evidence is foreclosed, due process is eliminated and arbitrary action results. Existence of other court proceedings involving this same issue shows that other carriers in the position of appellant have also suffered from lack of due process. Continuation of this policy by the Commission will seriously jeopardize the operations of numerous carriers and disrupt the automobile hauling field.[8] Thus, appellant respectfully invokes the attention of this Court.

Despite the conclusions contained in the motions (Intervenor, p. 8; Government, pp. 4 and 5) that, in effect, no new grant of authority or change in com-

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[7]Exhibits 1, 6, 8, and 11 provide information substantiating these conclusions. Thus, Convoy's investment at Portland, Oregon, is almost $2,000,000.00. In 1963 and 1964 it delivered 16,000 Chrysler vehicles in Oregon through Portland, compared with 1553 by Western in a 26-month period. All exhibits mentioned in this brief refer to those offered to the District Court.

[8]Counsel for intervening appellee Commercial Carriers at the hearing before the three-judge District Court stated:

> "Likewise, I have on my desk additional petitions to file. There has been some delay. I think the volume of petitions are starting to come in to the Commission now. They are coming in." (Official Transcript, p. 59.)

petitive position is involved in the Commission's decision, the fact is that by virtue of that decision Commercial Carriers is permitted to intrude into an area of operation within which it had distributed little traffic before and with respect to which it would perform an entirely different service than previously, and thereby threaten to impair the operation of appellant.

The Commission itself, however, as appellant offered to prove before the District Court, has on occasion not granted modified certificates to carriers hauling more traffic than was revealed by Commercial Carriers. For example, Exhibit 6 shows that Robertson Truck-A-Ways, Inc. hauled 2,346 Chrysler vehicles to Oregon, compared to 363 by Commercial, for the same period, yet the Robertson petition[9] was denied and the Commercial petition granted. Such is the result of arbitrarily determining cases without an opportunity to the parties to be heard or submit evidence.[10]

By reason of the matters set forth above, appellant urges that *Motor Convoy* was not a holding by this Court or, in fact, by the District Court, that the Commission may, under the circumstances of this case, dispense with an oral hearing or acceptable equivalent. It has here been shown that the simple legal principle urged by the Government and intervening appellee cannot be applied in a vacuum but must be considered

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[9]The Robertson record is Exhibit 12.

[10]In the order and judgment (J.S., Appendix A), the District Court stated that it was not determining the admissibility of the evidence offered by appellant to the Court. It is clear that the District Court had a right to receive it and to give it more than the perfunctory consideration which the judgment indicates. See Section 2c of Argument, pp. 14-15.

in relation to the history of the development of the policy relied on, the facts of record of this case, and those revealed by the exhibits offered to the District Court.

It is argued further than when this broader treatment is accorded, then the principles to be applied are those which were urged in the Jurisdictional Statement.

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**2. IN LIGHT OF THE FACTS, PERTINENT LEGAL PRINCIPLES WARRANT THE INTERVENTION OF THIS COURT.**

**a. Other Commission Orders and Decisions Invalidate NATA.**

The Government and intervening appellee urge that *Motor Convoy* upheld the policy enunciated in NATA that a mere showing of past operations proved public convenience and necessity and warranted the issuance of "modified" certificates by the Commission. Appellant has shown the negligible volume of the prior hauling by Commercial Carriers which constitutes the only supporting record before the Commission other than a letter from an official of Chrysler Corporation stating that it felt that Commercial Carriers should be entitled to compete.[11] No party herein has considered that letter of any importance, since obviously it did not provide any showing of public convenience and necessity, and did not assert that existing service was in any way inadequate.

Appellant urges that the NATA policy, unless fortified by an appropriate record, cannot in itself be the basis for a grant of a certificate of public convenience

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[11] Appendix B to Commercial Carriers Petition for Modification.

and necessity. The Commission had in 1953 rejected the follow-the-traffic principle in the leading case of *Smith & Solomon Trucking Co.,* 61 M.C.C. 748, and was upheld on appeal. (J.S., pp. 15-18.) The motion of the Government (p. 5) attempts to disparage that case by contending that it applied to new certificates as distinguished from "modified" certificates. Appellant contends that a reading of that decision in the light of the arguments advanced by the parties in this case will clearly sustain the position of appellant that the "distinction" is one without a difference.

The motions, in resting on NATA, ignore the prophetic dissenting opinion therein of then Chairman Murphy of the Commission, with whom Commissioner Tuggle joined, in which it was pointed out that Ex Parte No. 230 was pending for the purpose of determining rules and regulations pertinent to the entire substituted service field. It was stated:

> "Thus, in my opinion, the decision here is unnecessary, premature, and a prejudgment of the issues proposed in the general investigation.—At the least, these rulings serve to inhibit our freedom of action in the general investigation, but, of even greater importance is the fact that they may well mislead the industry as to the course we will take in that proceeding." (p. 419.)

In conclusion, Chairman Murphy urged:

> "Rather I believe that their [the parties in the proceeding] interests would be served best by awaiting the final and informed judgment of this Commission on these issues in the general investigation." (p. 419.)

Not only did the Commission in Ex Parte No. 230 come to certain conclusions conflicting with those in NATA, as it conceded, but it established a new proceeding, Ex Parte No. 230, Sub No. 1, for the purpose of considering automobile transporting separately in the realm of substituted service. (J.S., pp. 8 and 9.) That proceeding has never been set for hearing by the Commission, therefore, the rules of automobile transporting are still in limbo. Yet, the Commission is giving effect to a policy which, in itself, is insufficient to award certificates, and is further impaired by the fact that it is not even a final policy.

The only responses of the Government (p. 6) are, first, that Ex Parte No. 230 did not embrace automobile transporting, which is obviously incorrect since Commissioner Murphy's dissent clearly shows that it did; and, second, that "Ex Parte No. 230, Sub No. 1, is specifically limited to TOFC service and at issue here is MLRC service." The Government is in error again. All the plans developed by the Commission with respect to substituted service are referred to as TOFC plans, meaning "trailer-on-flat-car". In the NATA proceeding it became necessary to determine whether TOFC would include MLRC, meaning "multi-level rail car" movements. At pages 411 and 412 of NATA, this question was discussed and the Commission clearly concluded that MLRC was, in effect, a part of TOFC. In its findings at page 417, the Commission specifically held that the use of TOFC, Plan I, could be utilized under the conditions set forth by the automobile transporters. There is no question but TOFC

as there used includes MLRC in accordance with the conclusion at page 412. The notice of hearing in Ex Parte No. 230, Sub 1, itself clearly discloses that the Government is in error on both points. It shows that Ex Parte No. 230, was intended to cover the full scope of coordinated and substituted motor-rail service, including automobile transporting, and that MLRC is included in Ex Parte 230, Sub 1, for it says, in part:

> *"It appearing,* That notice of proposed rule making was given by the entire Commission by order of June 29, 1962, and served July 2, 1962, in Ex Parte No. 230 (27 F. R. 6434) respecting the practices of, and the manner and methods of the performance and use of coordinated and substituted motor-rail service, as particularly described in that order, and all similar and related types of service, *including, but not limited to, so-called 'piggyback' service,* of all railroads, motor carriers, water carriers, express companies, and freight forwarders of property operating in interstate or foreign commerce;"
>
> *"It is ordered, That the portion of Ex Parte No. 230 embracing the transportation of motor vehicles by authorized motor carriers,* be, and it is hereby, reopened for oral hearing at a time and place to be hereafter fixed and assigned Ex Parte No. 230 (Sub-No. 1) and entitled as set forth in the caption under (Sub-No. 1);" (Italics supplied). (49 CFR Ch. 1, Published in Federal Register, November 10, 1963, at page 12227.)

The position of the Government would lead to the ridiculous conclusion that the Commission is to hold an investigation concerning substituted service only when trailers are loaded on flat cars, ignoring the

MLRC service which now embraces the vast majority of all of the coordinated movements in the transportation of motor vehicles.

**b. Citations of Intervening Appellee Distinguished.**

Intervening appellee argues that the Commission does not have to hold a hearing in determining the statutory criteria to be met before a certificate of public convenience and necessity can be issued. (Motion, pp. 5 through 8). It is argued (p. 5) that this Court has given recognition to the discretionary power of the Commission to establish procedural criteria, citing *United States v. Pierce Auto Freight Lines,* 327 U.S. 515, and *Interstate Commerce Commission v. Parker,* 326 U.S. 60. The fact is that both proceedings involved extensive hearings before the Interstate Commerce Commission and the issues with which the Court was there concerned have no pertinency, which appellant can discover, to the case here.

Intervening appellee also cites (Motion, p. 6) *United States v. Storer Broadcasting Co.,* 351 U.S. 192, holding (p. 205) that an oral hearing is unnecessary where all of the evidentiary facts upon which the issues can be determined are capable of presentation in the pleadings. The *Storer* case is unique in that the Federal Communications Commission there had established a general rule limiting the number of stations in which an applicant could have an interest and when it applied to operate a station above that number, the policy of the Commission precluded the granting of the application. Storer could not bring itself within

the general policy, therefore, the Commission concluded there was no purpose in having a hearing. That is a far cry from the situation here where the policy adopted is not *prohibitory* affecting only the applicant itself. Here we are faced with an affirmative policy pursuant to which certificates are granted ex parte in violation of the statute requiring proof of public convenience and necessity.

Intervening appellee argues (Motion, p. 6) that there is no issue of fact here. This completely ignores all of the offers of evidence which were made by appellant. No hearing was held by the Commission nor was modified procedure invoked by it. (J.S., p. 11.) Thus, appellant was not even permitted to offer verified statements under the modified procedure provided for in the General Rules of Practice of the Commission. The Commission determined the whole case upon the basis of the bare petition and the reply of appellant. Appellant requested an opportunity to be heard, but was foreclosed from presenting the evidence it told the Commission it had for presentation. It presented that evidence to the District Court without avail. This is the crux of the whole controversy and the whole basis of the distinction of *Motor Convoy* wherein no evidence was offered by the complaining motor carriers, according to the Court, either before it or the Commission.

**c. The District Court Erred in Not Considering Evidence Offered to It.**

The Court below should have received and given consideration to the evidence offered by appellant. It

was not limited to the record before the Commission. The principle has well been stated, as follows:

> "However, the general rule limiting review to the record made before the agency is not always observed and is not without its exceptions. The absence of essential findings of fact or sufficient information to disclose the basis for the agency's action, or the presence of a constitutional or jurisdictional fact question, or the fact that the evidence was not capable of being introduced below, *or that the determination was made ex parte,* may require the courts to permit the admission of evidence which was not before the agency." (Emphasis supplied). 2 Am. Jur. 2d 595.

**d. Hearing or Equivalent Is Required.**

Appellant, in its Jurisdictional Statement, page 14, cited *First National Bank of Smithfield v. First National Bank of ENC,* 232 F.Supp. 725 (1964) in which the controller of currency approved a new bank license without a hearing, contrary to the usual practice. The Court relied on the Administrative Procedure Act and procedural due process in holding that fairness and regularity require the development of a record, and where there is no hearing, no findings of fact, and no development of the evidence by way of a record, the Court cannot determine if the holding is arbitrary. The controller argued that to be required to hold a hearing would be an undue burden. The Court rejected this contention.

In the strong dissent of Judge Luther Bohanon in *United Transports, Inc., and Auto Convoy Co. v. United States,* 245 F.Supp. 561 (J.S., p. 14) he clearly

denoted the need for review by this Court so that the requirements of the Fifth Amendment and the Administrative Procedure Act could be fulfilled. That case is now on appeal to this Court. Thus, it is apparent that at least one judge of the District Court is concerned about the lack of fair dealing in these decisions issued under the NATA policy.

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## CONCLUSION

The Commission, in the matter complained of, issued a new grant of extended authority to a competitor of appellant on the basis of the policy adopted in NATA. The record consists of the bare petition of the applicant itself and the reply of appellant. All requests of appellant for hearing and for an opportunity to introduce described evidence were rejected. Appellant renewed the offer to introduce evidence and prepared exhibits of that evidence which were tendered to the District Court. However, the District Court, on the same day as the argument was heard, issued its order and decision dismissing appellant's complaint, citing *Motor Convoy,* and for good measure it asserted that there was substantial evidence to support the Commission's decision—obviously, an insupportable conclusion. It further arbitrarily gave but cursory consideration to the evidence offered by appellant and did not receive it. It is clear that the District Court rested entirely upon *Motor Convoy.* Unless relief is granted by this Court, appellant will have inflicted upon it an important competitor without any proof of public convenience and necessity, and many additional

"modified" certificates will be issued by the Commission without observance of procedural due process which will lead to further actions in the Federal Courts for relief. As has been shown, at least one District Judge is highly disturbed by this form of arbitrary action and has written a vigorous dissenting opinion which appellant respectfully urges be considered by this Court.

The *Motor Convoy* case involved substantial equities which were apparent in favor of the applicant there. The result is, that in cases such as this, where the equities are all with the carrier in the position of appellant, the same wide broom is used to sweep them aside, without any proceeding being made available for the submission of evidence contrary to the consistent practice of the Commission.

This Court should deny the motions to affirm, should note probable jurisdiction, hear this direct appeal on its merits and reverse the judgment of the Court below.

Wherefore, appellant so prays.

Dated, December 20, 1965.

Respectfully submitted,

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END